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THE PROGRESS OF THE LAW, 1918–1919

EQUITY[1]

LITTLE that is new is involved in the decisions upon equity during the past year. There are a few interesting applications of settled principles. Also there are occasional instances of what the critical student of equity must pronounce judicial slips. But for the most part a reviewer may do no more than discuss the reasoning by which courts arrived at sound results called for by well-understood doctrines and point out certain tendencies in the administration of equity to which they appear to testify. In one aspect such a condition is gratifying, as indicating that the judicial system is functioning as it should. From another standpoint, however, it cries out for change. After reading upwards of fourteen hundred double-column pages of judicial opinions, carefully sifted from many thousands of pages in the National Reporter System, one is impelled to ask why paper, printer's ink, labor, and shelf-room should be devoted to the perpetuation of what for the largest part is avowedly but repetition of things long familiar and is too often merely elaborate elucidation of the obvious.

I

NATURE OF EQUITY JURISDICTION AND OF EQUITABLE RIGHTS

1. Equitable Remedies

A group of cases involving constructive trusts invite consideration of what such a "trust" really is. An express trust is a substantive institution. Constructive trust, on the other hand, is

[1] This is the fourth article in a series written by professors in the Harvard Law School in which it is intended to point out the most notable decisions, books, articles, and statutes, coming under the notice of the author, which affect or explain the law in the topic under discussion. The following articles have appeared: Joseph H. Beale, "The Conflict of Laws," 33 HARV. L. REV. 1; Austin W. Scott, "Civil Procedure," 33 HARV. L. REV. 236; Zechariah Chafee, Jr., "Bills and Notes," 33 HARV. L. REV. 255. The series will be continued in the February number. — ED.

purely a remedial institution. As the chancellor acted *in personam*, one of the most effective remedial expedients at his command was to treat a defendant as if he were a trustee and put pressure upon his person to compel him to act accordingly. Thus constructive trust could be used in a variety of situations, sometimes to provide a remedy better suited to the circumstances of the particular case, where the suit was founded on another theory, as in cases of reformation,[2] of specific performance,[3] of fraudulent conveyance,[4] and of what the civilian would call exclusion of unworthy heirs,[5] and sometimes to develop a new field of equitable interposition, as in what we have come to think the typical case of constructive trust, namely, specific restitution of a received benefit in order to prevent unjust enrichment. In the latter case, constructive trust appears as what might be called a remedial doctrine, alongside of election, subrogation, contribution, and exoneration. In the cases first put it is rather to be compared to negative decrees where historical prejudice or practical difficulties make courts hesitant to frame decrees affirmatively,[6] to enforcement of incidental negative covenants in order to bring about performance of affirmative covenants which cannot be coerced directly because of practical obstacles,[7] and to enforcement of arduous alternative duties at home in the expectation of coercing affirmative action abroad.[8] In neither case is there the substance of a trust. This is not a matter of mere academic classification. Of the cases decided during the past year, two[9] clearly recognize that a constructive trust is imposed simply as a remedy — in those cases as a convenient form of specific performance. Other cases where it is used in the same

[2] Cole *v.* Fickett, 95 Me. 265, 49 Atl. 1066 (1901).

[3] Compare the doctrine of the "equitable ownership" of purchaser in a land contract; the Massachusetts doctrine as to when vendor is a "trustee" under the statute allowing real enforcement of decrees as to land held in trust, Felch *v.* Hooper, 119 Mass. 52 (1875); the "trust" in Parker *v.* Garrison, 61 Ill. 250 (1871); and the constructive trust imposed on one who takes subject to a vendor's duty of conveying.

[4] 1 PERRY, TRUSTS, § 164.

[5] DIG. XXIV, 9, 9, § 1; NOV. 115, c. 3, § 12, c. 4, § 6; FRENCH CIVIL CODE, art. 727; GERMAN CIVIL CODE, §§ 2339–2344.

[6] Lane *v.* Newdigate, 10 Ves. 192 (1804); Hood *v.* North Eastern R. Co., L. R. 8 Eq. 666 (1869).

[7] Lord Davey in Yorkshire Miners' Ass'n *v.* Howden, [1905] A. C. 256, 269.

[8] California Development Co. *v.* New Liverpool Salt Co., 172 Fed. 792 (1909).

[9] Trout *v.* Ogilvie, 182 Pac. (Cal. App.) 333 (1919); Signaigo *v.* Signaigo, 205 S. W. (Mo.) 23 (1918).

way seem to think of it as something substantive,[10] and in one this confusion discloses serious possibilities, leading the court to decide a question of the statute of limitations, in a suit by a donee in a parol gift who had partly performed, upon the principles applicable to an express trust.[11]

In *Hausner* v. *Wickham* [12] a testator was about to devise land to his granddaughter, subject to a life estate in his son, her father. By reason of threats made by the son, and upon the son's agreement to leave the land by will to his daughter, testator devised it to the son. It will be seen that the case is in substance the same as *Cassey* v. *Fitton*,[13] and it was properly decided in the same way. But the court treats it as a case of specific performance of a contract and thus becomes involved in the theoretical difficulties which are encountered in *Cassey* v. *Fitton*. If one bears in mind the purely remedial nature of constructive trust, the results which courts have reached in this sort of case are attained with much less difficulty. They should be compared with the cases where the heir murders the ancestor or the devisee murders the testator.[14] In those cases courts have been willing, on the one hand, to read a judge-made exception into the statute of descents or statute of wills, or, on the other hand, to allow the murderer to retain the fruits of his crime because the latter was not enriched at the expense of those next in succession and there were theoretical difficulties in raising a constructive trust as something substantive.[15] Likewise in such cases as *Cassey* v. *Fitton* courts have struggled vainly with a contract theory, being deterred by similar theoretical difficulties in raising a constructive trust. But in truth, when put in this way, the choice is between the frying pan and the fire.

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[10] Stewart *v.* Todd, 173 N. W. (Ia.) 619 (1919).

[11] Peixouto *v.* Peixouto, 181 Pac. (Cal. App.) 830 (1919). This case will be considered more fully in another connection.

[12] 105 Misc. 735, 172 N. Y. Supp. 680 (1918).

[13] 2 HARGRAVE, JURIDICAL ARGUMENTS, 296; 1 AMES, CASES IN EQUITY JURISDICTION, 145.

[14] Kuhn *v.* Kuhn, 125 Ia. 449, 101 N. W. 151 (1904); Holdom *v.* Ancient Order, 159 Ill. 619, 43 N. E. 772 (1896); Wellner *v.* Eckstein, 105 Minn. 444, 117 N. W. 830 (1908); Perry *v.* Strawbridge, 209 Mo. 621, 108 S. W. 60 (1908); Shellenberger *v.* Ransom, 41 Neb. 631, 59 N. W. 935 (1894); Riggs *v.* Palmer, 115 N. Y. 506, 22 N. E. 188 (1889); Deem *v.* Milliken, 53 Ohio St. 668, 44 N. E. 434 (1895); Carpenter's Estate, 170 Pa. 203, 32 Atl. 637 (1895).

[15] Kuhn *v.* Kuhn, *supra;* Wellner *v.* Eckstein, *supra.*

One who succeeds by operation of law or by devise, when in equity and good conscience he should be excluded, and hence another should take in his stead, may be made to give up what he ought not to be suffered to hold by the remedial device of a constructive trust. The task is to find a solid theory of why he should not be allowed to take, not one of finding an enrichment at some one's expense who is to be beneficiary of a substantive trust.

A like remedial device, easily confounded with a substantive legal institution, is the imposition of an equitable lien. Recent cases generally perceive the true nature of this lien.[16]

2. Enforcement *in Rem*

Although legislatures are grinding out a huge grist annually, the power of courts of equity to give real effect to their decrees is still in doubt or undefined or over-narrow in too many jurisdictions.[17] During the past year two courts have had to pass upon the question,[18] and in one case the matter was so doubtful that two out of five judges dissented.[19] When we remember that an excellent model was set up in this country as far back as 1785,[20] it is significant of our toleration of archaic legal machinery that such questions should remain open anywhere in the second decade of the twentieth century. This matter deserves to be taken up by bar association committees.

3. Foreign Decrees

This mooted question is passed on in *Matson* v. *Matson*[21] and is considered in Professor Barbour's paper on "The Extra-Territorial Effect of the Equitable Decree." [22] The Iowa court adopts and Professor Barbour urges the view taken in *Mallette* v. *Scheerer*,[23] in which an Illinois decree awarding alimony out of Wisconsin lands was enforced in Wisconsin, as against the contrary view taken in *Bullock* v.

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[16] Fleming *v.* Fleming, 202 Mich. 615, 168 N. W. 457 (1918); Hodgson *v.* Martin, 90 Ore. 105, 175 Pac. 671 (1918).

[17] See Huston, The Enforcement of Decrees in Equity, Appendix of Statutes.

[18] Bush *v.* Aldrich, 96 S. E. (S. C.) 922 (1918); Birch *v.* Covert, 99 S. E. (W. Va.) 92 (1919).

[19] Bush *v.* Aldrich, *supra.*

[20] Laws of Maryland, 1785, c. 72, § 14.

[21] 173 N. W. (Ia.) 127 (1919).

[22] 17 Mich. L. Rev. 527.

[23] 164 Wis. 415, 160 N. W. 182 (1916).

Bullock,[24] *Fall* v. *Fall*,[25] and *Fall* v. *Eastin*.[26] The analogy of enforcement of foreign judgments and of foreign money-decrees on which they chiefly rely does not seem to me in point. Under modern statutes allowing enforcement of money-decrees by execution they are on the same basis as money judgments. But it is to be noted that it is only money judgments that are enforced abroad, and that this "enforcement of the judgment" is a dogmatic fiction. In the Roman law the claim sued on underwent a novation in the "procedural contract" of *litis contestatio*.[27] In our law the debt sued on was merged in the judgment. Hence in legal theory the original claim no longer existed, and in order to allow it to be asserted abroad it became necessary to invoke a "quasi-contractual" obligation to pay the judgment.[28] But in equity the suit is to compel defendant to do his duty, and that duty is not necessarily merged in the decree, so that if the decree fails of effect, an action may still be brought upon plaintiff's legal right, if he has one. Thus there was never any necessity for proceeding subsequently on a theory of enforcing the decree rather than the original claim. Moreover, in such cases as *Bullock* v. *Bullock* there is no need of suing on a right created by the decree. The right to alimony exists independently of and anterior to the decree. It may be asserted as such where the land lies,[29] and a decree may be had there either awarding the land or money which can be made from the land. If conveyances have been executed with notice in fraud of that claim the ordinary equitable remedy against such conveyances will meet the case.[30] On the other hand, if we are to allow

[24] 52 N. J. Eq. 561, 30 Atl. 676 (1894).

[25] 75 Neb. 104, 106 N. W. 412, 113 N. W. 175 (1905).

[26] 215 U. S. 1 (1909).

[27] KELLER, DER RÖMISCHE CIVILPROCESS UND DIE ACTIONEN, 5 ed., § 60.

[28] "For just as a contract is made by stipulation . . . so there is a contract by judgment; therefore we must not look to the origin of the proceeding, but to the very obligation, as it were, of the judgment." Ulpian in DIG. XV, 1, 3, § 11. Compare KEENER, QUASI CONTRACTS, 16–17.

[29] Cochran *v.* Cochran, 42 Neb. 612, 60 N. W. 942 (1894).

[30] Matson *v.* Matson, as the court points out, may be distinguished from Bullock *v.* Bullock, Fall *v.* Fall, and Fall *v.* Eastin in that in the Iowa case the husband was a party to and was served with process in the second suit, which thus becomes in substance one to assert the claim to alimony existing by the laws of Iowa, as well as those of Washington, anterior to and proved by the foreign decree, and to set aside the conveyance in fraud thereof. There seems no good reason why these could not be joined in one proceeding.

a court of equity in New York to create duties to convey New Jersey land, to-day when a duty to convey land, specifically enforceable in equity, in effect, and very generally in theory involves an equitable ownership capable of assertion against the whole world, unless and until cut off by conveyance to a purchaser for value without notice, the result is to allow one state through its courts to create real rights in land in another state — and if it may do so by its courts, why not through its legislature?

4. Restraining Actions in Other Jurisdictions

Others have called attention to a recent tendency to exercise more freely the jurisdiction to enjoin legal proceedings abroad.[31] Examples of this tendency may be seen in *Weaver* v. *Alabama R. Co.*[32] and *Culp* v. *Butler*,[33] while the older and, as it seems, better view is set forth in *Wells Lumber Co.* v. *Menominee River Boom Co.*[34] Much of the difficulty in such cases arises from the ambiguity of the term "jurisdiction" and from not distinguishing between the rules determining jurisdiction and the principles governing the exercise of jurisdiction. Three questions have to be asked: (1) Has the sovereign jurisdiction through any of his courts — that is, has he the power actually to coerce the person or act upon the *res?* (2) If he has, has his court of equity jurisdiction, — that is, is the plaintiff's right equitable only, or if it is legal, is the legal remedy therefor adequate? (3) If equity has jurisdiction, should that jurisdiction be exercised in the present case? At one time there was a tendency, chiefly in American state courts, to confuse the second and the third and to turn the principles governing exercise of the chancellor's jurisdiction into rules limiting that jurisdiction. Instead of inquiring whether the remedy at law was adequate under the particular facts and whether, if it was not, under the principles governing exercise of equity jurisdiction the case called for equitable relief, many courts sought to dispose of equity cases by referring them to certain abstract categories: Was the contract one calling for continuous performance, was it a building contract, was it a contract for the sale of a chose in action, was it a contract

[31] 33 Harv. L. Rev. 92.
[32] 76 So. (Ala.) 364 (1917).
[33] 122 N. E. (Ind. App.) 684 (1919).
[34] 168 N. W. (Mich.) 1011 (1918).

for personal service? This unfortunate tendency has spent itself. But a similar confusion of the second and third with the first is appearing. Undoubtedly a state may coerce its citizens not to sue abroad. It does not follow, however, that its courts of equity have jurisdiction to do so in every case, or that they ought to exercise such jurisdiction in every case where it exists. We have to ask: What are the legal rights of the plaintiff in equity, defendant abroad, and are the legal remedies which are open to him adequate to maintain those rights? We have then to ask, is the injustice and hardship upon the plaintiff such as to make it expedient for equity to act, in view of the delicate considerations involved in interference with legal proceedings in other states?

Three types of case may be distinguished in which courts have enjoined litigation in foreign jurisdictions. In one the foreign court had no jurisdiction, but the threatened foreign judgment would embarrass plaintiff in the assertion of his rights, the legal remedy of collateral attack on the judgment when set up against plaintiff involved danger of impairment of the evidence by which its invalidity could be made to appear, and to compel plaintiff to go to the foreign state to defend or attack the threatened judgment directly involved compelling him to litigate abroad with a wrongdoer whom he could reach at home.[35] In a second type concurrent litigation between the same parties over the same subject matter was in progress or was threatened. In some of the cases of this type there was simply a vexatious multiplicity of actions.[36] Here courts were cautious about interposing.[37] In others, one court was not in as good a position to do complete justice as another.[38] In still others, the defendant was seeking to obtain an inequitable advantage over other creditors by means of concurrent litigation abroad.[39] In a third type there was an attempt of domestic creditors to reach exempt property of a domestic debtor by means of an action

[35] *E. g.*, Kempson *v.* Kempson, 58 N. J. Eq. 94, 43 Atl. 97 (1899).

[36] *E. g.*, French *v.* Hay, 22 Wall. (U. S.) 250 (1874).

[37] "If this court has the power, it must be a very special case which will induce it to break over the rule of comity, and of policy, which forbids the granting of an injunction to stay the proceedings in a suit, which has already been commenced, in a court of competent jurisdiction in a sister state." Walworth, C., in Burgess *v.* Smith, 2 Barb. Ch. (N. Y.) 276, 280 (1847).

[38] See what is said on this point in Harris *v.* Pullman, 84 Ill. 20 (1876).

[39] Cole *v.* Cunningham, 133 U. S. 107 (1890); Sercomb *v.* Catlin, 128 Ill. 556, 21 N. E. 606 (1889).

outside of the state.[40] To these some courts are adding a fourth: Cases where the foreign court has jurisdiction, in which there is no concurrent litigation or vexatious multiplicity of actions, and in which there is no attempt to reach anything which the policy of the local legislation seeks to secure to the plaintiff, but in which a domestic creditor seeks to sue a domestic debtor, as he has full legal power to do, in another state, where the latter has property, because of more favorable procedure or more favorable views as to what is a defense in the latter jurisdiction. In these cases it cannot be said that plaintiff (in equity) has a legal right only to be sued at home, nor may he claim a legal interest in the procedure or substantive law of his domicile. Doctrines of Conflict of Laws may sometimes require the court in the other state to judge the cause by the laws of the jurisdiction where the parties are domiciled. But that is a matter for that court to consider and does not give to the latter jurisdiction any claim to exclusive cognizance of the cause nor to its citizens any legal claim to make their defense solely at their domicile. As between a plaintiff and a defendant, each seeking the tribunal more favorable to him, why should not equity leave the matter to the law? The only consideration which may be urged in such cases is the expense involved in litigating abroad what might well be litigated at home. This expense falls on both alike, and the Michigan court says aptly:

"The only situation which would seem to justify a court of one state in stopping, by its writ of injunction, the prosecution of a case pending in a court of a sister state, would be where the equitable considerations are plain and compelling, and the aggrieved party, through poverty, is utterly unable to present his equities to the foreign court." [41]

Otherwise:

"the only satisfactory doctrine, because the only doctrine compatible with the dignity of the courts of the country and the orderly administration of justice everywhere, would be to hold the court in which the objectionable suit was commenced, and that court only, entitled, at the instance of the aggrieved party to refuse to proceed further with the suit, where it appears the object of the plaintiff was to evade the law of the state of his residence, and, upon view of the facts and the laws of

[40] *E. g.*, Snook *v.* Snetzer, 25 Ohio St. 516 (1874).

[41] Wells Lumber Co. *v.* Menominee River Boom Co., 168 N. W. (Mich.) 1011, 1016 (1918).

the state of the residence of the parties applicable thereto, the court is convinced the prosecution of the suit pending before it to judgment or decree would result in giving the plaintiff an unconscionable advantage." [42]

II

RECOVERY OF SPECIFIC CHATTELS

In *Rawll* v. *Baker-Vawter Co.*[43] an employee had deposited with the employer company two bonds of the employer as security for his performance of the terms of the employment. The bonds were of the par value of $1,000 each and were part of an issue of $250,000. They were "not listed upon any exchange or curb market." It appeared that there had been some sales at par within three or four months, and at 80 within a year. There were some two hundred and fifty holders. It was held, two judges dissenting, that a suit in equity would not lie to recover the bonds in specie. The majority rely upon a series of decisions as to specific performance of contracts for the sale of securities.[44] But it should be noted that in those cases the plaintiff was not an owner whose property was detained wrongfully by a bailee, but a purchaser who claimed a contract right to have the specific securities transferred to him. Is it adequate protection of the rights of an owner of specific securities to say to him, you can't get the securities themselves from the wrongdoer who detains them, but through an action of trover you may obtain what a jury finds them to be worth, on the basis of some recent sales, and endeavor with the money to buy at that price, if you can, from some one of two hundred and fifty holders who may be willing to sell? One may feel also that the language, at least, of some New York cases as to contracts to sell securities

[42] See *supra*, note 41. Compare Turner, L. J., in Pennell *v.* Roy, 3 DeG., M. & G. 126, 139 (1853): "If we were to maintain this injunction we should, as it seems to me, be assuming a jurisdiction in this Court to prescribe the Courts in which parties should bring their suits, without there being anything to affect the consciences of the parties, upon the simple ground that the suits were such as, in the opinion of this Court, ought not to be maintained, and thus we should be bringing under the decision of this Court the question whether suits in other Courts could be maintained, — a question which it is for those Courts and not for this Court, to decide. To assume such a jurisdiction would, I think, be to exercise a legislative and not merely a judicial power."

[43] 176 N. Y. Supp. (Misc.) 189 (1919).

[44] Butler *v.* Wright, 186 N. Y. 259, 78 N. E. 1002 (1906); Clements *v.* Sherwood-Dunn, 108 App. Div. 327, 95 N. Y. Supp. 766 (1905), 187 N. Y. 521, 79 N. E. 1102 (1907); Waddle *v.* Cabana, 220 N. Y. 18, 114 N. E. 1054 (1917).

is somewhat narrow.[45] It is interesting to note that in this case the statute of limitations had run against the actions of trover and replevin, which were said to afford an adequate remedy at law, but not against a suit in equity, so that relief was only possible in equity. Could plaintiff claim to be legal owner and invoke the concurrent jurisdiction of equity to maintain that ownership by a more adequate remedy after the legal remedies of trover and replevin were barred? Or must the statute of limitations, in jurisdictions where it applies to suits in equity, have run also upon the concurrent equitable remedy, if any?

III

SPECIFIC PERFORMANCE

1. Insolvency of Vendor

In four cases the courts had or took occasion to consider the effect of insolvency of the defendant. In two of them the contract did not entitle the plaintiff to call for a specific *res*, one being a contract for the delivery of so much corn generally,[46] the other a like general contract for the delivery of so much machine-mined coal.[47] In the former the court said rightly that insolvency was no basis for relief. In the latter the court refused relief in the absence of showing of insolvency. In two other cases,[48] in which plaintiff was asserting a claim to a specific *res*, the court said that the remedy of damages against an insolvent would not be adequate. But in both it was equally inadequate as against a solvent defendant. Here again the source of disagreement is in not distinguishing between a ground of jurisdiction and an important circumstance in determining the exercise of jurisdiction. If plaintiff has no right to exact a specific thing, the insolvency of the defendant can not give him greater rights than his contract gives him. But if he has a right to a specific thing, the chancellor may still think, if money damages will enable him to get not the exact thing but something substantially as good, that the extraordinary interposi-

[45] In Waddle *v.* Cabana, *supra*, the court points out that the two prior cases turn largely on practice and indicates a more liberal view.

[46] Union Co-operative Co. *v.* Adolfson, 171 N. W. (Neb.) 902 (1919).

[47] Consolidated Fuel Co. *v.* St. Louis R. Co. (C. C. A.), 250 Fed. 395 (1918).

[48] Crawford *v.* Williams, 99 S. E. (Ga.) 378 (1919); Doty *v.* Doty, 171 N. Y. Supp. (Misc.) 852 (1918).

tion of equity is not worth while, and yet, when because of impossibility of collecting a judgment at law that substitute is not available, may hold that transfer of the specific thing should be enforced. If the contract is unilateral and defendant has the consideration, as it were, in his pocket, insolvency of the defendant, in the sense that he is proof against execution, may be a strong ground for exercising jurisdiction where ordinarily it would not be exercised.

2. Installment Contracts

Dells Paper Co. v. *Willow Lumber Co.*[49] is a good case of this type. The contract was for the sale of logs and pulp wood to a paper mill for a period of twenty-six years and had been performed for seven years. Specific performance was granted. In *Davison Chemical Co.* v. *Baugh Chemical Co.*[50] the contract called for delivery of sulphuric acid in stated yearly quantities for a period of five years. Specific performance was denied, but the case turns on questions of interpretation and impossibility of performance. The former, and a like decision in New York some years ago,[51] should be compared with the refusal of the Privy Council to follow *Buxton* v. *Lister*[52] in an unusually strong case, complicated, however, by questions of continuous performance and practical obstacles in the way of specific enforcement.[53] In this matter the American courts have taken a less mechanical and more enlightened view, looking to the circumstances of each particular case to see whether the legal remedy is or is not substantially adequate and not trying to lay down a hard and fast rule that all installment contracts are or are not specifically enforceable simply because they call for performance in the future.

3. Contracts for the Sale of Stock

Three of these cases are clear enough. In *Nason* v. *Barrett*[54] ownership of the stock would carry with it control of a coal company.

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[49] 173 N. W. (Wis.) 317 (1919).

[50] 133 Md. 203, 104 Atl. 404 (1918).

[51] St. Regis Paper Co. *v.* Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967 (1903).

[52] 3 Atk. 383 (1746).

[53] Dominion Coal Co. *v.* Dominion Iron & Steel Co., [1909] A. C. 293, 311, reversing S. C. 43 N. S. 77, 145 (1908).

[54] 140 Minn. 366, 168 N. W. 581 (1918).

The purchaser could say I have a right to get a controlling interest in *this* company, not in what someone else may think a venture just as good, and the law gives me no way to get it. In *Cape-Girardeau-Jackson R. Co.* v. *Light and Development Co.*[55] the contract was for sale of the stock and bonds of a railroad company as a whole and amounted to sale of the railroad. In *Amsler* v. *Cavitt*[56] the number of shares was limited, the stock was not on the market, and purchaser had an interest in the corporation. *Toles* v. *Duplex Power Co.*[57] is more doubtful. The contract was for sale of one thousand shares in a manufacturing company of somewhat speculative prospects. Plaintiff alleged that at the time the bill was filed the stock was worth double its par value. The contract called for sale at par. No question was made as to fairness, but the court held the remedy at law adequate, saying:

"He was not attracted to the stock by any desire to become its owner for sentimental reasons. It was with him purely a commercial transaction to which he was moved in a business way by inside information which made the stock attractive as a speculation. We see no reason why the measure of damages for this alleged breach of contract is not as readily ascertainable in an action at law as in chancery."

It is submitted that this does not meet the case. No doubt a court of law could assess damages here; but would it not in substance deprive plaintiff of the benefit of his contract? The theory on which damages are taken to be an adequate remedy is that the plaintiff may take the money and purchase other stock of the same sort or another speculation just as good. But here he could not get this stock on the general market and if the shares had doubled in value since the contract, he might well believe they would go higher still and might properly insist on the bargain he made. The ultimate outcome of the speculation was so conjectural that the legal remedy would not insure him a substitute substantially as good. The remarks of Jessel, M. R., in *Fothergill* v. *Rowland*[58] have done harm in these cases, as in cases of installment contracts, by confusing the question whether a jury is in a position to assess damages at all with the different question whether, however

[55] 210 S. W. (Mo.) 361 (1919).
[56] 210 S. W. (Tex. Civ. App.) 766 (1919).
[57] 202 Mich. 224, 168 N. W. 495, 497, 498 (1918).
[58] L. R. 17 Eq. 132, 140 (1873).

accurate the legal measure of damage, money damages will secure to the plaintiff what he is legally entitled to or the substantial equivalent thereof.

4. Contracts to Lend Money

Norwood v. *Crowder*[59] involved a contract to lend plaintiff one thousand dollars upon the security of plaintiff's share in a plantation. The cause turned on the ability of plaintiff to convey a good title, and as defendant made no other objection, a decree for plaintiff was affirmed on the ground that his title was made out. But the court, following the general doctrine, says that such a contract is not specifically enforceable. We may grant that ordinarily the remedy at law would be adequate. A loan could be had elsewhere and the measure of damage would be the increased rate at which plaintiff had to borrow and the loss caused by any delay. But if the borrower has a contract to lend without security or on inadequate or unusual security, or if money is not readily obtainable for the sort of loan to which the contract entitled him, the legal remedy is not adequate. In such a case as *Norwood* v. *Crowder*, where one may suspect there was some such situation, the real question is as to mutuality of performance. If the lender is required to advance the money, can the court assure him that he will get back his money years hence when it is due? Where this difficulty is out of the way under the peculiar circumstances of the case,[60] or the contract amounts in substance to a purchase of an issue of securities. the courts do not tell us that the legal remedy is adequate.

5. Construction Contracts

Strauss v. *Estates of Long Beach*[61] was a suit for specific performance of a contract to build a sewer. The circumstances were such that money damages would not enable the plaintiff to get the sewer to which he was entitled because of defendant's control of the *locus*. Hence the case is clear. But it is of interest to note that defendant relied on *Beck* v. *Allison*,[62] while the court answered with *Jones* v. *Parker*.[63] That characteristically sensible and

[59] 99 S. E. (N. C.) 345 (1919).
[60] *E. g.*, Caplin *v.* Penn Life Ins. Co., 82 App. Div. 269, 169 N. Y. Supp. 756 (1918).
[61] 176 N. Y. Supp. (App. Div.) 447 (1919).
[62] 56 N. Y. 366 (1874).
[63] 163 Mass. 564, 40 N. E. 1044 (1895).

liberal decision is not the least of the many contributions of Mr. Justice Holmes to our law. A question similar to that in *Jones* v. *Parker* was involved in *New York R. Co.* v. *Stoneman*,[64] where a tenant sued for specific performance of the landlord's covenant that "the demised premises shall be heated by the lessors to a proper warmth for office purposes." A ruling that the bill could not be maintained was reversed.

6. Certainty

One of the stock objections in construction contracts is want of sufficient certainty. As this objection was exceptionally well handled in *Jones* v. *Parker*, *supra*, it is convenient to bring together at this point all the cases treating of "certainty" in connection with specific performance. *Penney* v. *Norton* [65] involved a contract for the sale of land. No time was fixed for payment. But, as the law would construe the contract to require payment within a reasonable time, it would seem that no difficulty as to certainty was encountered. Yet the objection was made and the court met it by saying that tender of the conveyance had made the time of payment certain. In *Wilson* v. *Beaty* [66] a contract for the sale of land fixed the purchase price and the date at which it should all become due, but provided for notes for deferred payments, to be paid in five years, without fixing the number or time of execution of the notes. On objection for want of certainty, the court held properly that these provisions were only an option as to the mode of payment for the benefit of the purchaser, and when not availed of did not prevent specific performance. *Feenaughty* v. *Beall* [67] was a suit to enjoin breach of a covenant not to engage in competing business. The covenant read: "We further agree that we will not enter directly or indirectly into any organization or individual connection in the same line of business in or about the city of Portland or this territory whereby the interests of Beall & Co. will be in any measure interfered with." This was held too uncertain for specific enforcement because of the indefiniteness of the word "territory," and because of the uncertainty "from the language of

[64] 123 N. E. (Mass.) 679 (1919).

[65] 81 So. (Ala.) 666 (1919).

[66] 211 S. W. (Tex. Civ. App.) 524 (1919).

[67] 91 Ore. 654, 178 Pac. 600 (1919). Compare Standard Fashion Co. *v.* Magrane Houston Co. (C. C. A.), 251 Fed. 559 (1918).

the writing what the parties considered at the time to be an interference with the interests of Beall & Co."

It is worth while to notice how "certainty" came to play so large a part in the law of specific performance. When the chancellor was struggling to establish his jurisdiction with jealous courts of law eying him narrowly, the dignity of the court had to be maintained and it was jeopardized by any order which the chancellor could not be sure of enforcing. Hence he was chary of decrees for affirmative performance of anything beyond a single act, and when he did decree performance of anything involving details, he felt that execution of the details must be supervised. Thus the notion arose that if a court of equity ordered a thing done it was bound to stand over every item and see it done according to the decree. This idea had two consequences. On the one hand it led to a prejudice against enforcement of construction contracts and contracts for continuous performance, since they called for continued supervision, and since the "court cannot by its ordinary means and instrumentalities carry out the decree" where such continued supervision is required.[68] It led also to a prejudice against affirmative decrees in any case where more than a single simple act was sought and a preference for negative decrees wherever possible. Though this has died out in England,[69] it is still strong with us. On the other hand, since the court ought not to make a contract for the parties but only to enforce it as they made it, it led to a doctrine that every detail of performance ought to be fixed by the agreement so that the court could supervise and exact each detail without departing from or adding to the agreement. Accordingly the older cases were too squeamish about absolute certainty in all details. *Jones* v. *Parker* took a step forward in holding that where there was a contract at law, if there was an objective standard, capable of determination and application by experts, there might be specific performance. The court could very well leave the details to the choice of the defendant where the contract did. But the old notion, intrenched in textbooks and encyclopedias, dies hard.

In *Feenaughty* v. *Beall*, construing the contract so as to give it effect and validity if we may reasonably do so consistently with

[68] 4 POMEROY, EQUITY JURISDICTION, 3 ed., § 1402.

[69] Jackson *v.* Normanby Brick Co., [1899] 1 Ch. 438.

its terms, may we not fairly interpret "territory" to mean the region tributary to Portland in the usual course of such a business (something which business men can usually fix pretty definitely) and interpret the other clause to mean that defendants shall do nothing which amounts to business competition with covenantees' business? If the courts "ought not to be wiser than the parties" and make their contracts over for them, they ought not to conjure up objections that blind them to what the parties have agreed to and thus defeat fair business transactions.

7. Contracts for Continuous Performance

Reference has been made to the prejudice for historical reasons against affirmative decrees in cases calling for more than a single simple act. This is illustrated by *Mobile Electric Co.* v. *City of Mobile.*[70] The contract required the defendant to furnish electric light and current for ten years. It was objected that this called for continuous performance. The court said:

"While the bill is in the nature of a bill for specific performance of a contract, it does not call for the continuous performance of same by all the parties thereto running through a series of years; it seeks by the negative means of injunction the enforcement of a public duty by preventing the respondents from shutting off the lights of the citizens who comply with the terms of an existing contract placing upon the respondent the discharge of a public duty."

All this is quite in line with the orthodox way of treating such cases.[71] But the English courts are now decreeing specific performance affirmatively under these circumstances,[72] and it must be admitted that the supposed practical difficulties sought to be avoided by use of the negative form are more theoretical than real and grow chiefly out of *ex post facto* attempts to put a reason behind a historical prejudice. It is significant that one American court during the past year has avowedly followed the English practice.[73]

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[70] 79 So. (Ala.) 39 (1918).

[71] Hood *v.* North Eastern R. Co., L. R. 8 Eq. 666 (1869); Keith *v.* National Tel. Co., [1894] 2 Ch. 147; Prospect Park R. Co. *v.* Coney Island R. Co., 144 N. Y. 152, 39 N. E. 17 (1894).

[72] Fortescue *v.* Lostwithiel R. Co., [1894] 3 Ch. 621, 640–641.

[73] Brown *v.* Western R. Co., 99 S. E. (W. Va.) 457 (1919).

Two other cases involve interesting points as to the form of the decree. In *Village of Larchmont* v. *Larchmont Park* [74] a suit to enforce a contract to maintain a sewage system, the decree provides for plaintiff's doing the work and for charging defendant's land with a lien for the expense. Apparently because it looked too much like real execution and because of jealousy of equity on the part of courts of law, which required the chancellor to proceed cautiously in the direction of enforcement *in rem*, our precedents thus far have been against this eminently common-sense mode of enforcing construction contracts and contracts for continuous performance.[75] But it exists in other parts of the world and has been urged by English writers.[76] Also it seems to be authorized by the new Federal Equity Rules.[77] That it found its way into a decree in the jurisdiction of *Beck* v. *Allison* may illustrate how the exigencies of judicial administration of justice will sooner or later require resort to modern machinery despite all technical and historical objections. In *City of LaFollette* v. *LaFollette Water Co.*,[78] in granting specific performance of a contract to furnish water and light to a municipality Judge Sanford said:

"It should further, in my judgment, be an equitable provision of the decree for specific performance that the plaintiff consent that this cause shall be retained on the docket to the end that if at any time the plaintiff shall fail to perform its part of the contract or advancement in science shall disclose new methods of improving the water, which can be installed at a reasonable expense and which can reasonably be required of the plaintiff in a water works system of the character in question, considering all the surrounding circumstances, or the water should become from any cause dangerous to the health of the inhabitants, the defendant shall have leave to apply to the court in supplemental proceedings for such relief as it may be entitled to receive in the premises as a condition of keeping the decree for specific performance in full force and effect."

This use of a conditional decree is an admirable example of a court of equity at its best.

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[74] 185 App. Div. 330, 173 N. Y. Supp. 32 (1918). Commented on in 32 HARV. L. REV. 730.

[75] Rayner *v.* Stone, 2 Eden, 128 (1762); Beck *v.* Allison, 56 N. Y. 366 (1874).

[76] Clark *v.* Glasgow Co., 1 MacQueen, 668 (1854); FRY, SPECIFIC PERFORMANCE, § 109; Amos, "Specific Performance in French Law," 17 L. QUART. REV. 372, 377.

[77] Fed. Equity Rules, rule 9.

[78] (C. C. A.) 252 Fed. 762, 774 (1918). Commented on in 32 HARV. L. REV. 439.

Public interest is often a controlling circumstance in these cases of contracts for continuous performance. This is illustrated by several decisions in 1918–19.[79] But a salutary warning as to the limitations of this doctrine is to be found in *Driver* v. *Smith*.[80]

8. CONTRACTS FOR PERSONAL SERVICE: NEGATIVE COVENANTS

In *Whitman* v. *Whitman* [81] an aged father agreed with his son that the latter should take over certain mortgaged premises and the business which the father conducted thereon and, on payment by the son of the mortgage out of the profits of the business, the father was to convey the property to him. The son was then to give the father a lease for life and the two were to receive their living from the business. The land having been conveyed, the father sued to require the son to provide for his living. The court held that a reconveyance could not be decreed, but that the amount required to support and maintain the plaintiff should be paid to him annually and should be a lien upon the land. While this is not a contract for personal service it comes very near one, and a captious court might have made itself much trouble with "practical obstacles" to relief. The main point was to prevent unjust enrichment of the son at the father's expense and to secure to the father his contract right to his living out of the property conveyed. There is, it is true, danger of making over the contract when a court makes use of a remedial device of this sort.[82] In such a decree as that in *City of LaFollette* v. *LaFollette Water Co.*,[83] where Judge Sanford made the plaintiff accept certain modifications of the contract as a condition of specific performance, we are on surer ground. If the plaintiff will not consent, he may have his remedy at law on the contract as made. If he desires equitable relief, he may be required to do equity by accepting reasonable modifications

[79] Mobile Electric Co. *v.* City of Mobile, *supra;* Village of Larchmont *v.* Larchmont Park, 185 App. Div. 330, 173 N. Y. Supp. 32 (1918); Brown *v.* Western R. Co., *supra;* Oconto Electric Co. *v.* City, 168 Wis. 91, 169 N. W. 293 (1918); Armour *v.* Texas R. Co. (C. C. A.), 258 Fed. 185 (1919).

[80] 89 N. J. Eq. 339, 104 Atl. 717 (1918).

[81] 174 N. W. (Mich.) 153 (1919).

[82] Compare Title Ins. Co. *v.* California Development Co., 171 Cal. 173, 152 Pac. 542 (1915), where as part of the mortgaged land was in Mexico but the mortgagor was a California corporation, the court ordered the land in California and the stock of the California corporation which would control the property in Mexico to be sold.

[83] 252 Fed. 762 (1918).

in view of supervening events which would make performance according to the unmodified terms a hardship.[84] These cases are significant of a return to the classical conception of the chancellor's powers and the manner of their exercise, and are in welcome contrast to the inflexible mechanical methods of a generation ago, which then seemed to import a decadence of equity. Yet there was some basis for the fear of arbitrary action on the part of the chancellor which led cautious courts to these mechanical methods, and we must be on our guard against a recrudescence of the seventeenth- and eighteenth-century tendency to make contracts over for the parties.[85] It may be noteworthy in this connection that three courts during the past year found it necessary to lay down emphatically that they had no power or inclination to do more than enforce the contract as the parties made it.[86]

Tribune Ass'n v. *Simonds* [87] has already been commented on in this REVIEW. It applies the doctrine of *Lumley* v. *Wagner* [88] to the case of an editorial writer of unique character, not only by reason of his abilities but because of special knowledge, who had been given special value also through plaintiff's spending some thirty-five thousand dollars in exploiting him. Here the hardship upon plaintiff, if left to a remedy at law, was so great as to justify the court in wrestling mightily with mere practical obstacles to relief. In *Driver* v. *Smith* [89] the same court had before it the case of three employees of a manufacturing company who had covenanted to serve for two years and not "to be connected or concerned in any other business or with any other person whatsoever during the said two years of service." Here the negative had no separate significance, and the affirmative was not merely one affording obstacles to enforcement but one that ought not to be enforced specifically. Following *Sternberg* v. *O'Brien* [90] an injunc-

[84] Compare Curran *v.* Holyoke Water Power Co., 116 Mass. 90 (1874).

[85] *E. g.*, Lord Thurlow's decree criticized in Drewe *v.* Hanson, 6 Ves. Jr. 675, 678 (1802); Lord Thurlow's view that time could not be made of the essence even by express stipulation, Williams *v.* Thompson (1782), NEWLAND, CONTRACTS, 2 ed., 238.

[86] Stoddard *v.* Stoddard, 124 N. E. 91 (1919); Fairey *v.* Strange, 98 S. E. (S. C.) 135 (1919); Hermann *v.* Goddard, 82 W. Va. 520, 96 S. E. 792 (1918).

[87] 104 Atl. (N. J. Eq.) 386 (1918), commented on in 32 HARV. L. REV. 176, 17 MICH. L. REV. 97.

[88] 1 DeG., M. & G. 604 (1852).

[89] 89 N. J. Eq. 339, 104 Atl. 717 (1918).

[90] 48 N. J. Eq. 370, 22 Atl. 348 (1891).

tion was denied. *Standard Fashion Co.* v. *Magrane Houston Co.*[91] was a bill to enjoin breach of a covenant "not to sell or permit to be sold" on its premises other patterns than the plaintiff's. The court does not seem to have been satisfied by the evidence that the negative covenant had any separate significance, nor that any great hardship on the plaintiff would result from leaving it to an action at law. On the other hand, the practical difficulties involved seem more theoretical than real, and the case does not appear very different in principle from *Butterick Co.* v. *Fisher*,[92] which the court observes it is not bound to follow. The covenant was held too uncertain to be enforced and a question of its validity under the Clayton Act was also involved. Under such circumstances it is to be regretted that the court felt called on to throw doubt upon the power of equity to coerce affirmative action by means of enforcement of negative covenants and to quote the *dictum* of Mr. Justice Holmes in *Javierre* v. *Central Altagracia* [93] in this connection.

Much of the difficulty in such cases grows out of confusing situations where a court ought not to enforce a covenant directly or indirectly and those where there is no reason why it should not be enforced if it may be, but there are practical considerations in the way of direct enforcement. Where the covenant calls for "service of a confining nature and under the direction of the employer as to details," [94] there is more than a practical obstacle. The court ought not to exact performance even if it could. In other cases the interference with privacy or personal liberty may make direct enforcement impossible. In others it may be impossible to coerce directly a course of affirmative action involving individual taste or skill or judgment. In such cases there may be no policy of the law against enforcing the service, so that if the court, without making over the contract, can make use of a negative of separate significance to enforce the contract "in the only manner in which it could be enforced," [95] there may be every reason for doing so.

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[91] (C. C. A.) 251 Fed. 559 (1918).

[92] 203 Mass. 122, 89 N. E. 189 (1909).

[93] 217 U. S. 502, 508 (1910).

[94] Clyatt *v.* United States, 197 U. S. 207, 215 (1905).

[95] Yorkshire Miners' Ass'n *v.* Howden, [1905] A. C. 256, 269. See also Cincinnati *v.* Marsans, 216 Fed. 269 (1914); Metropolitan Exhibition Co. *v.* Ewing, 42 Fed. 198 (1890); Great Northern R. Co. *v.* Telephone Co., 27 N. D. 256, 265, 145 N. W. 1062 (1914).

Where breach of the negative involves a damage by itself apart from or over and above breach of the affirmative, it can be no objection to enforcement of that negative that it may tend to enforce an affirmative that ought to be performed. Mutuality of performance is a doctrine of equity for the protection of defendants by insuring to them when performance is exacted of them that they get the counter performance due them. If they obstinately refuse to avail themselves of the opportunity to have all that the contract calls for, by remaining idle when enjoined from breaking the negative covenant, they ought not to be heard to complain. Great hardship upon plaintiff, as, for example, in *Tribune Ass'n* v. *Simonds*, *supra*, may properly move the court to attach little weight to the possibility that the defendant, by doing nothing, may perform part of the contract with no equivalent.

Eastman Kodak Co. v. *Warren* [96] involved a covenant not to enter the service of a competitor within two years after termination of the employment. The covenant was not at all necessary for protection of the covenantee, and employees to do the kind of work in question were readily procurable. In substance the case is like *Sternberg* v. *O'Brien*,[97] and was so decided. *Roper* v. *Pryor* [98] is more doubtful. It does not appear that plaintiff had any interest in enforcement of the negative beyond holding defendant to his promise. In *Clark Paper Co.* v. *Stenacher*,[99] on the other hand, if defendant was permitted to break his covenant and enter the service of a competitor, his knowledge of plaintiff's customers and trade methods, and the confidential information he had acquired, involved serious possibilities of injury. Hence the case is like *Salomon* v. *Hertz*,[100] and was so decided. *Rowe* v. *Toon* [101] was a suit to enjoin breach of a covenant not to compete with a business which defendant had sold to plaintiff. It differs in this respect from *Roper* v. *Pryor*, *supra*, where defendant had been plaintiff's clerk, and the injunction was rightly granted.

In *White Marble Lime Co.* v. *Consolidated Lumber Co.*[102] a lumber

[96] 178 N. Y. Supp. (Misc.) 14 (1919).
[97] 48 N. J. Eq. 370, 22 Atl. 348 (1891).
[98] 102 Neb. 709, 169 N. W. 257 (1918).
[99] 177 N. Y. Supp. (Misc.) 614 (1919).
[100] 40 N. J. Eq. 400, 2 Atl. 379 (1885).
[101] 169 N. W. (Ia.) 38 (1918).
[102] 172 N. W. (Mich.) 603 (1919).

company agreed to sell wood slabs to a lime company "so far as the production of their mill may enable them to do so." Afterwards, finding a higher price could be obtained elsewhere, they contracted to sell the slabs produced at their mill to a chemical company. The case differs from *Donnell* v. *Bennett*[103] in that the chemical company and the lime company were not competitors. Hence the implied negative had no separate significance. Because of the limited supply, uncertainty of the market, and necessity of such fuel to plaintiff's business, the decree enjoined sale to the chemical company, expecting thus to enforce specific performance without requiring the supervision of the court.

(*To be continued*)

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[103] 22 Ch. D. 835 (1883).